No. 85-588

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

THE UNIVERSITY OF TENNESSEE, *et al.*,

Petitioners,

VS.

ROBERT B. ELLIOTT,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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On Writ of Certiorari to the
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BRIEF IN OPPOSITION

Statement of the Case

This case presents a question already decided by this Court: whether an unreviewed decision of a state administrative agency may be accorded res judicata effect in a subsequent federal court proceeding

in an action under 42 U.S.C. § 2000(e) (Title VII), 42 U.S.C. §§ 1981, 1983, 1985, 1986, 1988.

Robert Elliott, respondent herein, is a black employee of the University of Tennessee Agricultural Extension Service. Appendix at A1. On December 18, 1981, respondent was advised that he was to be terminated from his job. Four days later, respondent filed an administrative appeal under the Tennessee Uniform Administrative Procedure Act (Appendix at A1-A2), and on January 5, 1982, he filed a complaint in federal district court alleging violations of, inter alia, Title VII, and Sections 1981 and 1983.

An administrative hearing was held before the Assistant Vice President for Agriculture of the University's Institute of Agriculture, who acted as hearing examiner and administrative judge.

Appendix at A182. The hearing examiner was aware of Elliott's pending federal action and explicitly stated that the agency had no jurisdiction to determine the merits of a civil rights claim.[1] The hearing examiner explicitly rejected the notion that he should attempt any resolution of a claim of racial discrimination: "... if jurisdiction exists ... it exists in ... Federal District Court and [the] employee may not try his civil rights actions in this forum," Appendix at A45. The hearing examiner ruled that the University should transfer respondent rather than terminate his employment, because only four of the eight charges raised by the employer were substantiated.

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[1] The examiner permitted some evidence of racial discrimination to be introduced "to give ... a more full understanding of the matter ..." and in the nature of an affirmative defense to the employer's charges. Appendix at A44.

Appendix at A77-179. The hearing examiner's initial order was adopted by the Vice President of the University's Institute of Agriculture, thereby making final the agency decision. Appendix at A33-35.

The Tennessee statute provides for judicial review of a final agency decision by the State chancery court; however, that review is limited to a review of the administrative record to determine whether the agency decision is "arbitrary, capricious, or unsupported by substantial evidence. Appendix at A5.

Respondent did not seek state court review of the final agency determination, but rather elected to pursue his federal claims in federal court by proceeding with his already filed action. Appendix at A7, 29. The district court granted petitioner's motion for summary judgment on

the grounds that it had no jurisdiction to review the administrative agency decision and that the agency decision was entitled to res judicata effect. Appendix at A31-32.

The Sixth Circuit, applying decisions of this Court, reversed the district court's dismissal of respondent's claims.

SUMMARY OF ARGUMENT

The petition for a writ of certiorari should be denied, because the court below, in holding that an unreviewed administrative decision should not have preclusive effect in a subsequent federal court action raising federal claims of racial discrimination, correctly applied the decisions of this Court. Review of this case because of an asserted conflict would be inappropriate, given the facts of this case.

ARGUMENT

Reasons for Denying the Writ

I. THE SIXTH CIRCUIT CORRECTLY HELD THAT A DISTRICT COURT SHOULD NOT GIVE RES JUDICATA EFFECT TO AN UNREVIEWED ADMINISTRATIVE DECISION AND THAT RULING IS CONSISTENT WITH DECISIONS OF THIS COURT

Petitioners assert that the decision below conflicts with the decisions of this Court in Allen v. McCurry, 449 U.S. 90 (1980) and Migra v. Warren City School District, ___ U.S. ___, 79 L.Ed.2d 56 (1984). This asserted conflict does not exist; the Sixth Circuit's decision comports with the holdings in those cases, as well as the holding in Kremer v. Chemical Construction Co., 456 U.S. 461 (1982).

Each of these cases concerned the preclusive effect of state court decisions on subsequent federal court proceedings. In Allen, this Court dealt with the question of whether issues that were actually litigated in a state court were entitled to preclusive effect in a Section 1983 action. Based on the determination that Section 1983 had not repealed 28 U.S.C. § 1738, this Court held that issue preclusion would apply.[2] The question left open in Allen, i.e., whether the same rule would apply where the federal issue could have been, but was not, litigated in the state proceeding, was decided by this Court in Migra, where this Court held

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[2] Section 1738 provides, in part, as follows:

> ... judicial proceedings [of any state] ... shall have the same full faith and credit in every court within the United States ... as they have ... in the courts of [that state] ....

that a state court judgment would be given claim preclusive effect in a Section 1983 action. Since the instant case involved no state court judgment, there is obviously no conflict between it and these two cases.

In Kremer, this Court applied those holdings to a Title VII action. Throughout that opinion, the Court refers only to state court decisions. This Court explicitly stated that "unreviewed administrative determinations by state agencies ... should not preclude [de novo] review even if such a decision were to be accorded preclusive effect in a state's own courts." 456 U.S. at 470 n. 7. See also id. at 487 (Justices Blackmun, Marshall and Brennan, dissenting) and id. at 508-509 (Justice Stevens dissenting). Petitioners attempt to read Kremer as making a distinction between decisions of

state administrative agencies with only investigatory authority and those with adjudicatory authority. Petition at 8. Respondent submits there is no support for such a distinction in any of those three cases.

Moreover, the decision below comports with the principles announced in Chandler v. Roudebush, 425 U.S. 840 (1976) and Alexander v. Gardner-Denver, 415 U.S. 36 (1974). In Chandler, this Court held that the right to a trial de novo on Title VII claims, available to private sector employees, extended to federal employees as well. Two years earlier, in Alexander, this Court had examined congressional intent and concluded,

> ... Congress, in enacting Title VII, thought it necessary to provide a judicial forum for the ultimate resolution of discriminatory employment claims. It is the duty of the courts to assure the full availability by this forum.

415 U.S. at 60 n. 21. The Sixth Circuit has acted on that duty and has properly determined that respondent is entitled to pursue his claims in court, relying on the decisions of this Court.

II. THE WRIT SHOULD BE DENIED BECAUSE THE FACTUAL ISSUES CONSIDERED BY THE SIXTH CIRCUIT ARE VERY DIFFERENT FROM THOSE CONSIDERED IN OTHER CIRCUITS

Including the instant case, according to the Petition, five courts of appeal have issued decisions post-Kremer that examined the question of whether state administrative agency determinations should be accorded res judicata effect in a subsequent Title VII action in federal court.[3] Only one of those decisions,

[3] See, Buckhalter v. Pepsi-Cola General Bottlers, Inc., 768 F.2d 842 (7th Cir. 1985); Heath v. Morrell & Co., 768 F.2d 245 (8th Cir. 1985); Elliott v. University of Tennessee, 756 F.2d 982 (6th Cir. 1985); Bottini v. Sadore Management Corp. 764 F.2d 116 (2d Cir. 1985); Ross v. Communications Sattellite Corp., 759 F.2d 355 (4th Cir. 1985).

Buckhalter v. Pepsi-Cola General Bottlers, Inc., 768 F.2d 842 (7th Cir. 1985), arguably poses a conflict with the holding below.[4] However, respondent does not recommend plenary review of the instant case, since it concerns a decision rendered, not by an independent body whose specific mandate is to decide employment discrimination claims, but rather by a hearing examiner in the employ of the very body accused of discrimination and

[4] Petitioners assert that there is also a conflict betwee the Sixth Circuit and the Third Circuit; however, inasmuch as the affirmance of the district court in O'Hara v. Board of Education, 590 F.Supp. 696 (D.N.J. 1984) was without an opinion (760 F.2d 259 3d Cir. 1985), it is impossible for this Court to determine the basis for the Third Circuit's holding and therefore whether there is a conflict and, if so, the nature of any conflict.

reviewed by that same body. Supra, pp. 2, 4. Cf. Chandler v. Roudebush, supra, 425 U.S. at 863 n.39 (congressional insistence on de novo review based on potential "conflict of interest"). Thus, the asserted conflict is not a clear one, and respondent would submit that the best course would be for this Court to deny the petition to permit further consideration by the remaining courts of appeal and deal with the issue at a later date.[5]

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5 Even fewer circuits have considered the question of whether state administrative decisions should be accorded preclusive effect in subsequent federal court proceedings under §§ 1981 and 1983 post-Kremer. See, Zanghi v. Incorporated Village of Old Brookville, 752 F.2d 42 (2d Cir. 1985) (according preclusive effect to determination by Commissioner of Motor Vehicles of probable cause for arrest and drivers' license revocation) and Moore v. Bonner, 695 F.2d 799 (4th Cir. 1982) (refusing to accord preclusive effect to unappealed decision of a county board of education).

CONCLUSION

For the foregoing reasons, the writ should be denied.

Respectfully submitted,

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